STRICT PRODUCTS LIABILITY: THE ORIGINAL INTENT

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The adoption of Section 402A of the *Restatement (Second) of Torts* in 1965 is commonly viewed as initiating a revolution in the law of torts. Obviously, Section 402A's standard of strict liability for defective and unreasonably dangerous products transformed the field of products liability from a minor adjunct of warranty law into an enormous source of modern litigation. But the transformation of law occasioned by the adoption of the strict liability approach has been broader. It is common to regard Section 402A as having shifted the basis of American tort law altogether from the modest concerns of corrective justice toward the far bolder objectives of regulating safety and providing widespread compensation. In the United States before the Section 402A revolution, and in common law countries without some version of Section 402A today, tort law serves chiefly to restore some relationship between parties that has been upset through morally negligent behavior.[1] Since the Section 402A revolution in the United States, in contrast, tort law has become the dominant modern policy instrument for regulating harm-causing activities and providing compensation to the injured.

The dimensions of this conceptual revolution in tort law should not be underestimated. Throughout its history, the United States has regarded direct regulation of industrial activities with suspicion, limiting regulatory intervention to a narrow set of industries, most commonly those dominated by natural monopoly. Yet today, after the tort law revolution of the mid-1960s, courts employ civil damage judgments to establish fine-tuned incentives to control the accident rate by internalizing injury costs to every product manufacturer and every service provider.

The influence of the tort law revolution of the 1960s on compensation goals has been equally dramatic. The United States has never

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[1] See, e.g., Murphy, Medieval Theory and Products Liability, 3 B.C. Indus. & Com. L. Rev. 29 (1961).

adopted the society-wide injury compensation systems common to most other Western industrialized nations. Yet, following the tort law revolution, courts aspire to use the civil justice system to provide compensation broadly to injured persons. Moreover, over the past decade, social welfare benefits in the United States have been largely frozen and in some cases diminished. In contrast, since the tort law revolution, United States courts have employed damage judgments to provide compensation insurance for the injured at benefit levels that vastly exceed current social welfare levels in the United States as well as the benefit levels of any other Western nation.

That a revolution occurred in tort law since the mid-1960s is not in doubt. What has remained mysterious, however, is the means by which this revolution occurred. It is obvious that there were important intellectual advocates of conceptual changes in tort law prior to the *Restatement* effort.[2] Legal scholars had promoted the expansion of tort law on deterrence and risk distribution grounds for decades, and before 1960 these scholarly approaches began to command increasing support.

The mystery derives from the lack of explanation of how these academic views could be translated so rapidly and thoroughly into public policy. Most puzzling is that this new conception of tort law was first introduced by the very conservative American Law Institute and then implemented by state supreme court judges who were probably among the most conservative members of the legal community. Support for a conceptual revolution among academics is not unusual; many academics strive to make reputations by claiming to be visionaries. But there is little return to revolution for members of the judiciary. And lawmaking by the American Law Institute, as the term for its projects—"Restatements"—suggests, has seldom aspired to the radical overturn of 300 years of civil jurisprudence that occurred in tort law.

This Paper attempts to explain these developments. It attempts to describe how the adoption of Section 402A simultaneously could be consistent with the conservatism of the American Law Institute and the American state judiciary and yet set the stage for the radical revolution in tort law that followed. It is well-known that the drafters of Section 402A (the founders of our modern tort regime) claimed

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[2] See, e.g., Ehrenzweig, Products Liability in the Conflict of Laws—Toward a Theory of Enterprise Liability Under 'Foreseeable and Insurable Laws,' 69 Yale L.J. 794 (1960); James, Accident Liability: Some Wartime Developments, 55 Yale L.J. 365 (1946). See also the discussion in Priest, The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law, 14 J. Legal Stud. 461 (1985).

that the Section introduced only a modest expansion of then-current warranty law.[3] Given the subsequent explosion in products liability, this claim of the founders has appeared either disingenuous or, to less skeptical readers, simply baffling.

This Paper tries to explain the founders' views. The Paper argues that the founders did not anticipate that the changes in the law introduced by Section 402A would initiate a revolution in tort jurisprudence. The founders believed that these changes would apply to only a small set of cases. For these cases, Section 402A would simplify recovery—though not dramatically increase the chances of recovery—by eliminating various technical defenses in warranty law. Strict liability would provide a simpler and more direct method of addressing these cases, but would not constitute a major substantive shift in the controlling standard of law.

More particularly, the founders did not fully appreciate the distinctions among manufacturing defects, design defects, and defective warnings that would become the centerpiece of modern law. Section 402A represented only a limited change in the law because the founders intended the Section's strict liability standard, with minor exceptions, to apply *only* to what we now call manufacturing defect cases. Section 402A and its Comments were drafted with little more than manufacturing defect cases in mind. There was unanimous agreement among the founders that design defect cases were to be controlled by traditional negligence law and that warning and instruction cases were to be controlled by a negligence approach.

This reinterpretation brings sense to what have otherwise been very puzzling (and, as I have argued elsewhere, damaging[4]) features of Section 402A and its Comments. Comment n rejecting the defense of contributory negligence, for example, and Comment j dealing with warnings and instructions have never been fully comprehensible and have been largely ignored even by strong defenders of modern strict liability.[5] As we shall see, once the original intent of the founders is located, these Comments take on radically different meanings from those commonly given to them today.

It is an implication of this interpretation of Section 402A that the great expansion of products liability law and of modern tort law more generally occurred after, rather than upon, the adoption of Section

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[3] E.g., Prosser, The Assault upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099 (1960).

[4] See Priest, Modern Tort Law and Its Reform, 22 Val. U.L. Rev. 1 (1987).

[5] See Landes & Posner, A Positive Economic Analysis of Products Liability, 14 J. Legal Stud. 535 (1985).

402A. In my view, the vast expansion of modern law occurred as courts attempted to apply strict liability concepts to design and warning defect cases in the years following 1965. Since the founders had not anticipated these applications, the interpretive guideposts in Section 402A's Comments proved in many instances unhelpful and in important other instances misleading. It is my view that the Comments contributed substantially to the expansion of liability, but in a way largely unintended by the founders. Indeed, it is a further implication of this history of Section 402A that the vast expansion of modern tort law since 1965 is at base inconsistent with the intent of the founders. In my view, if modern interpretations and applications of strict liability had been put to the founders in 1964, each of the founders, except for Fleming James, would have vigorously opposed them. Fleming James would have viewed our modern approach as a triumph, but a triumph far beyond any realistic hope that he might have had in 1965.

The description of these events should be useful not only for the understanding of how subsequent doctrinal changes occurred, but more importantly for the evaluation of the current vitality of Section 402A and its Comments. The vague and uninformed groping of modern courts toward the development of cost-benefit or risk-utility standards for design defect cases can be better understood when the limited scope that the founders intended for Section 402A strict liability is kept in mind. This demonstration may also be useful for the application of strict liability in new contexts. Recently, for example, the Council of the European Community has issued a Directive on strict products liability.[6] It is likely that, as the members of the Community look to adopt the strict liability standard, they will look to the *Restatement*'s Section 402A and to its Comments. To these readers, it will be instructive what the founders did and did not hope to achieve.

Part I describes the contract and negligence law in effect before 1960 that the founders aspired to overturn. Part I also explains why the founders regarded their objective (correctly) to be modest, and why there was little criticism that this change in the law was accomplished by a set of lawyers and, more narrowly, by law teachers, rather than by more democratic lawmaking bodies. Part II then looks at Section 402A and its Comments more carefully to define the founders' intent. Finally, Part III briefly sketches the development of products liability law after the adoption of Section 402A and tries to

[6] Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, [1985] O.J. L210/29.

explain why the founders' original intent for the Section has had so little influence.

I. PRODUCT DEFECT LAW IN THE 1950S AND WHY THE FOUNDERS OBJECTED TO IT

A. *Existing Law*

Section 402A was designed to correct deficiencies in the rights of action available to consumers suffering personal injury as a consequence of defective products. Before 1965, consumer rights of recovery were defined by warranty law and, to a substantially lesser extent, by negligence law. There were significant differences in rights of recovery across the jurisdictions. In all jurisdictions, however, a consumer could recover if in privity of contract and if the injury could be attributed to a breach of an express warranty or of the implied warranty of merchantability.[7]

Typically, these legal requirements limited injured consumers to suits against retailers under the implied warranty of merchantability. Consumer suits against manufacturers were constrained either because the consumer was not in privity with the manufacturer or because the manufacturer's express warranty (the existence of which was typically sufficient to create privity) explicitly excluded coverage of consequential personal injury damages. The privity requirement was easily satisfied in suits against retailers, but, of course, only by those injured consumers who had actually purchased the product. Retailers, however, seldom extend express warranties. Thus, against retailers, it was typically necessary for consumers to invoke the implied warranty of merchantability. The implied warranty allowed recovery, quite routinely, because a product causing personal injury was easily seen to violate the requirement that it be "reasonably fit" for the buyer's purpose or "of a merchantable quality."[8]

Even when these legal requirements were satisfied, however, it was necessary for the consumer to have given notice of the breach of contract to the seller within a reasonable time and to have carefully elected among available contract remedies. Generally, any complaint to the seller would satisfy the notice requirement, although many courts refused to regard a lawsuit as adequate notice; that is, it was necessary for the consumer to have made some intermediate communication with the defendant-seller prior to suit.[9] In addition, to re-

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[7] Uniform Sales Act §§ 12, 15 (1906).

[8] Id. §§ 15(1)-(2).

[9] This requirement was retained in the Uniform Commercial Code and only relaxed by judicial decision in the mid-1970s.

cover damages for personal injury, the consumer-plaintiff must have complied with Section 69 of the Uniform Sales Act requiring election of remedies. Section 69 was designed to prevent duplicative recoveries in more complex contractual contexts. It was drafted to require complainants to elect from among remedies that rescinded the contract, seeking to return the victim to the position occupied prior to the contract; remedies that affirmed the contract, seeking specific performance; and remedies that affirmed the contract, seeking damages for unfulfilled performance. Thus, Section 69 limited a consumer to *either* return of the product price (rescission of the contract), replacement of the product (specific contract performance), or consequential damages for contract breach.[10] As a consequence, in concept, if the injured consumer upon complaint had been given money back or had been given a new, nondamaged model of the product, or was found to have "elected" either of these remedies in the initial complaint, he or she was barred from any recovery for personal injury regardless of the seriousness of injury.

These legal provisions defined the easy cases for consumer recovery. There were other grounds that could be pursued where warranty law was unavailable. Many jurisdictions, for example, allowed recovery in contract law against manufacturers based upon representations in manufacturer product advertisements.[11] Here, again, the notice and election requirements needed to be satisfied. Moreover, there remained substantial difficulties in obtaining a recovery on this legal theory because it was necessary for consumers to prove that they had relied on the advertisement for the product purchase and because the typical manufacturer's advertisement was seldom more specific than the assurance presumed by the implied warranty of merchantability.[12]

Many other jurisdictions also allowed consumer recovery against manufacturers on negligence grounds. The negligence theory was not generally available because of the privity of contract bar. Many jurisdictions, however, permitted negligence actions despite the absence of privity in specific types of cases, most commonly where the product could be defined as "imminently dangerous,"[13] or in cases involving spoiled foodstuffs. Some courts had extended the foodstuff exception to products loosely described as "products for intimate bodily use." In fact, this description was contrived by academics pressing for the

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[10] Unless, of course, such damages were excluded by warranty.

[11] See Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932).

[12] *Baxter*, for example, was an exception because the advertisement specifically stated that an automobile's windshield glass, which subsequently shattered, was shatterproof. Id. at 459-60, 12 P.2d at 411.

[13] MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

extension of the rule.[14] The actual case law was a hodgepodge of idiosyncratic exceptions for hair-dyes, scalp treatments, skin formulas and the like, and some pharmaceuticals.[15] "Intimate bodily use" was a plausible fact-based link among these cases and, of course, was suggestive of the food cases in which bodily intimacy was a literal description of the problem. Some courts also had extended negligence liability through expansion of the res ipsa loquitur doctrine,[16] although there remained substantial evidentiary limitations to consumer success employing res ipsa.

B. The Founders' Objections

The simple desire of the founders was to ease consumer recovery in cases in which consumers had suffered personal injury from products which obviously had been mismanufactured. The founders wanted to make recovery in these cases automatic. In an earlier paper, I suggested that the rejection of contract law remedies and the expansion of strict tort liability derived from the influence of theories of risk distribution, accident reduction, and cost internalization.[17] But further study reveals that these theories became influential only some years later, as I shall attempt to explain. Several very influential scholars advocated the broad expansion of tort law on these grounds: Fleming James, Albert Ehrenzweig, and Robert Morris, in particular.[18] But these scholars remained on the edge of policy-making throughout the *Restatement* process. More central figures in the Restatement process occasionally alluded to risk distribution as grounds for extending liability,[19] but the arguments were most often simply additional points and seldom at the heart of the analysis.[20]

The more important figures in the *Restatement*—William Prosser, Page Keeton, Wex Malone, Dix Noel, and some others—had more simple objections to modern law. The concern of these scholars

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14 I believe that the characterization was invented by Prosser. See Prosser, supra note 3, at 1111-12.

15 For a review of the case law, see Priest, supra note 2.

16 Kalven, Torts: The Quest for Appropriate Standards, 53 Calif. L. Rev. 189 (1965) (reviewing California case law).

17 See Priest, supra note 2, at 463.

18 See F. Harper & F. James, The Law of Torts (1956) (in 3 vols.); Ehrenzweig, supra note 2; Morris, Enterprise Liability and the Actuarial Process—The Insignificance of Foresight, 70 Yale L.J. 554 (1961).

19 E.g., Keeton, Products Liability—Liability Without Fault and the Requirement of a Defect, 41 Tex. L. Rev. 855 (1963); Noel, Manufacturer's Negligence of Design or Directions for Use of a Product, 71 Yale L.J. 816 (1962).

20 Note that none besides James, Ehrenzweig, and Morris ever recommended extending liability more broadly towards a general compensation system which, of course, is the logical consequence of the superior risk bearing standard.

was a set of cases—not insignificant in number—in which consumers deserved automatic recovery for personal injury. For these cases, the warranty defenses of privity, notice, and election of remedies as well as the reliance requirement of the advertising theory and the various limitations on negligence recovery all were inapposite and counterproductive.

The cases for which the founders believed consumers deserved automatic recovery are what we now call manufacturing or production defect cases in which the injury to the consumer was caused by a deviation from the manufacturer's own standards of production or quality control. We shall see in a moment that the *Restatement* and its Comments make sole reference to manufacturing defect cases. But there is abundant evidence of the founders' focus on manufacturing defects both in their contemporaneous writings explicating and justifying Section 402A and in their writings of the preceding decade as they argued that the warranty and negligence limitations on recovery in manufacturing defect cases needed to be changed.

At least by the first of the 1960s, the founders agreed upon the goal of introducing the strict liability standard for product defects.[21] They sought to implement this objective through the American Law Institute's project for the second *Restatement of Torts*. William Prosser was the Reporter for the second *Restatement* and was joined as principal advisers by Wex Malone, Page Keeton, Clarence Morris, Fleming James, Roger Traynor and, later, John Wade.

The history of the progression of successive drafts of Section 402A through the *Restatement* process is well-known.[22] Each of the drafts attached strict liability[23] to, respectively, "food for human consumption" (1961 Draft); "food for human consumption or other products for intimate bodily use" (1962 Draft); and "any product" (1964, Final Draft); where such products are both "defective and unreasonably dangerous."[24] The founders coordinated their advocacy within the American Law Institute itself with a series of publications defending the approach. The principal task was to explain why the strict liability standard was justified in contexts of defective products

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21 Prosser had adopted this goal much earlier, at least by 1941. See W. Prosser, Handbook of the Law of Torts 692 (1941). For a discussion of the development of Prosser's views, see Priest, supra note 2, at 516-17.

22 For a recounting, see Priest, supra note 2.

23 Liability though "the seller has exercised all possible care." See Restatement (Second) of Torts § 402A (Tent. Draft No. 6, 1961); id. (Tent. Draft No. 7, 1962); and id. (Tent. Draft No. 10, 1964).

24 See sources cited supra note 23.

and what the term "defect" was to mean.[25]

Prosser's important article "Assault upon the Citadel" in 1960 presented an outline of the approach.[26] According to Prosser, a standard of strict liability for defective products simply introduced into law what had become the factual prerequisite for all negligence trials involving product injuries. In a negligence trial, Prosser asserted, the plaintiff must prove two points: first, "that his injury has been caused by a defect in the product"; and second, "that the defect existed when the product left the hands of the defendant."[27] The strict liability standard that Prosser was proposing only acknowledged more explicitly what was a reality at trial. As a consequence, Prosser believed, a standard of strict liability for product defects would introduce very little change in the law. Indeed, Prosser claimed that strict defect liability was essentially the equivalent of negligence: "an honest estimate might very well be that there is not one case in a hundred in which strict liability would result in recovery where negligence does not."[28] As we shall see, the principal difference Prosser sought to achieve through strict liability was the defeat of the various warranty defenses described above.

Throughout his writings, Prosser simply presumed that the definition of "defect" was uncontroversial; he never discussed the concept at any length.[29] His subordinates, however, thought it necessary to explicate the concept. Page Keeton, in a series of overlapping articles written during the progression of Restatement drafts, explained what the defect requirement was meant to achieve. In a 1961 article, written before the first Restatement draft, Keeton reviewed and criticized the various defenses in product injury cases. Keeton praised the expansion of the implied warranties to provide automatic plaintiff recovery and suggested other ways that the various contract and negligence defenses could be overcome.[30]

In articles published in 1963, after the Section 402A drafting process had commenced, Keeton focused on the defect issue itself. In an article published in the *Virginia Law Review*, Keeton reviewed the expansion of res ipsa loquitur as the most promising approach toward establishing a manufacturer's negligence. Keeton concluded with a

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25 As we shall see, and as is well-known, the "unreasonably dangerous" requirement was meant to limit the extent of strict liability.

26 Prosser, supra note 3.

27 Id. at 1114.

28 Id.

29 But see infra text accompanying notes 71-80, where Prosser's interpretation of "defect" can be inferred from the examples that he chose in the Comments to Section 402A.

30 Keeton, Products Liability—Current Developments, 40 Tex. L. Rev. 193 (1961).

repetition of Prosser's point: The most effective way to establish a seller's negligence was to show that the product was defective. Thus, if the standard for recovery were shifted from negligence to the existence of a defect itself, the plaintiff's burden would be reduced because the various defenses (which he had reviewed in 1961) would no longer prevent recovery.[31]

In a second article published in 1963, Keeton focused more carefully on the defect standard in a defense of the then-current 1962 draft of Section 402A which extended strict liability to food products and products for intimate bodily use.[32] Keeton argued that it must be recognized that no product is ever totally safe. As a consequence, if courts were to eliminate negligence and impose strict liability as proposed by the draft Section, it would be necessary to adopt some "delimiting principle"[33] as a substitute for negligence. The delimiting principle chosen in the *Restatement* is the requirement of proving that the product was defective.

According to Keeton, there are two fundamental types of product defects. The first is where the plaintiff's injury results from an "ingredient or condition of the product" of which the manufacturer was unaware at the time of sale. "[I]n this situation the product was different from products of like kind. There was a miscarriage in the manufacturing process . . . . [or] something deleterious in the product . . . ." (citing spoiled foodstuff cases).[34] Defects of this nature, of course, are now known as manufacturing defects.

The second fundamental category, according to Keeton, consists of defects which the manufacturer knows about at the time of sale. Keeton, however, is not referring to what we now call design defects. Keeton describes as examples of this second category products like cigarettes or cosmetics or pharmaceuticals, in which it is known that the product contains ingredients that will harm some set of consumers, but products whose harmful ingredients cannot be eliminated. Here Keeton is referring to what have come to be known as unavoidably unsafe products. Keeton presents as examples drugs or cosmetics that are safe and effective for most users, but harmful to some small set with allergies or particular sensitivities to some of the product's ingredients.[35]

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[31] Keeton, Products Liability—Proof of the Manufacturer's Negligence, 49 Va. L. Rev. 675 (1963).

[32] Keeton, Products Liability—Liability Without Fault and the Requirement of a Defect, 41 Tex. L. Rev. 855 (1963).

[33] Id. at 858.

[34] Id. at 859.

[35] Id. at 863-68.

According to Keeton, strict liability is only appropriate for the first category of defects (manufacturing defects).[36] Keeton's discussion of the second defect category (unavoidably unsafe products) consists of a review of the cigarette litigation, showing that there had been no cases in which cigarette manufacturers had been held liable—to him, for good reason: the risks of cigarette use were as well-known to the user as to the manufacturer.[37] Keeton does cite some cosmetic cases in which manufacturers had been held liable for allergic reactions, but only where "an appreciable number," as opposed to a small minority, of consumers had suffered the reaction.[38] Cases involving defects of this nature, Keeton concludes, must be governed by a negligence or fault standard. The number of individuals affected is a measure of the manufacturer's fault. The issue in such cases is whether the number of individuals adversely affected by the product is sufficient to regard the product as "unreasonably dangerous," the second of Section 402A's requirements.[39]

Of the advisers to the Restatement project, Keeton's was the most explicit discussion of Section 402A's defect requirement. It is very clear from his approach that the founder's conception of the defect standard was far different than the conception that prevails today. There was no thought at the time that the strict liability standard might apply to what we now call design defects. Indeed, Keeton in 1963 did not recognize design defects as a separate defect category.

This should not suggest that the problem of design-related product injuries was unknown to scholars of the time. Rather, from my research, it was the unanimous view that design problems should be governed by the negligence standard. Fleming James' 1955 survey of products liability, though tentatively suggesting movement toward strict liability, discussed design questions solely in terms of negligence.[40] More significant, Dix Noel, who concentrated his work in the field on the design problem, wrote three articles between 1962 and

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36 Id. at 858-61.

37 Id. at 868-72.

38 Id. at 863-68.

39 See id. at 871-72.

40 James, Products Liability (pt. 1), 34 Tex. L. Rev. 44 (1955) [hereinafter James, pt. 1]; James, Products Liability (pt. 2), 34 Tex. L. Rev. 192 (1955) [hereinafter James, pt. 2]. Compare James, pt. 1, supra, at 50-55 (manufacturer must use reasonable care and skill in designing product; must make product safe for "foreseeably probable" uses; and must consider the obviousness of danger and the likelihood it will be appreciated when taking precautionary measures) with id. at 66-68 (The expense of weeding out a defect may be unreasonable in relation to the threat. In deciding whether to weed out design defects, manufacturers should consider the obviousness of the danger, the necessity and adequacy of warning or other precautions, the degree of danger the defect poses, and the possible reliance of the manufacturer on a later handler to weed out the defect.). This paper, however, was written to become part of the

1966 on product design and in each presumed that the negligence standard was the most appropriate way of considering the design issue.

Noel's 1962 article in the *Yale Law Journal* was published at the midpoint of the Restatement process.[41] Noel distinguishes four types of design failures that could lead to consumer injury: concealed dangers (giving as an example an aluminum lounge chair with a hinge that amputates a consumer's finger); the failure to provide available safety devices; defective composition (for example in the choice of materials for an alloy); and, later, failure to provide adequate warnings or instructions.[42] According to Noel, the legal question appropriate for each of these design categories is whether the design made the product unreasonably dangerous. The court must look to the knowledge of the manufacturer at the time of production, the alternative design methods available, and the quantum of danger, all considerations traditional to negligence.

At the end of the article, Noel reviews the potential application to design cases of Section 402A's strict liability standard—then proposed only for defectively prepared food.[43] What he sees are largely problems. He sarcastically asks whether the strict liability standard could be invoked against cigarette manufacturers for defective cigarette design. The tone of the rhetorical question is so incredulous that the question is not worth an answer.[44] He then puts an example of an airplane, designed by the best experts available, which after deployment develops unsuspected tensions which cause a wing to be torn off. He presumes that a simplistic reading of the *Restatement*'s strict liability standard could regard the plane's design as defective and unreasonably dangerous. But, again, he is incredulous of the result, arguing "it is not clear that passengers in such a plane . . . should reasonably expect that it will be free even from flaws not yet discovered by any of the leading experts in the field."[45] Noel questions whether strict liability is a useful way of resolving design defect cases, concluding that negligence principles including contributory negligence—though at odds with the strict liability approach—must continue to be

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Harper-James treatise. For a discussion of James's more conservative ambitions for the treatise, see Priest, supra note 2, at 500-02.

41 Noel, Manufacturer's Negligence of Design or Directions for Use of a Product, 71 Yale L.J. 816 (1962).

42 Id.

43 Id. at 877.

44 Id.

45 Id. Noel adds offhandedly that "[p]erhaps liability even in this situation would be a useful means of spreading the loss." But Noel doubts the utility of the loss-spreading policy: "that holding might unduly discourage the development of useful new products." Id.

dominant.[46]

Despite the extension in fact of strict liability in succeeding years—first to products for intimate bodily use and then to all products—Noel continued to insist on negligence as the appropriate standard for design-related injuries. In a 1965 article in an important *Southwestern Law Journal* symposium on products liability, Noel again describes strict liability as applicable solely to manufacturing defect cases.[47] Even later in 1966, after the successful adoption of Section 402A, Noel again presumes that the negligence standard controls design problems.[48]

Noel's presumption that strict liability applies only to manufacturing defects and not to design-related defects was not unique. Each of the central figures of the Restatement project seems to have shared this view. John Wade, for example, whose work in later years would become influential in the design defect field, initially, at the origin of Section 402A, defined "defect" as manufacturing defect. In the 1965 *Southwestern* symposium, papers of which were presented just prior to the ALI's final adoption of Section 402A, Wade describes the defect requirement in terms identical to those of Page Keeton, discussed above.[49] A defect under Section 402A, according to Wade, is "a mistake in the manufacturing process, for example, the product was adulterated or one of its parts was broken or weakened or not properly attached."[50] Strict liability can be defended, Wade argues, because for products of this nature, "there is no need of proving fault in [the manufacturer's] letting it come to be in that condition."[51]

Like Keeton, Wade believes that more difficult problems arise where the product does not deviate from the manufacturer's specifications or quality standards, but still proves to be dangerous—that is, where the product is unavoidably dangerous or incorporates a dangerous design. Again, to Wade, the question in these cases is whether the

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46 Id. at 877-78. There is a hint in Noel's article of criticism of strict liability on any terms and of resentment of the Restatement group. Noel was not an Adviser to the *Restatement* on Section 402A. But see Prosser's heavy reliance in his advocacy of Section 402A on General Motors Corp. v. Dodson, 47 Tenn. App. 438, 338 S.W.2d 655 (1960), which Noel's work had inspired. For a discussion of this point, see Priest, supra note 2, at 515.

47 Noel, Recent Trends in Manufacturers' Negligence as to Design, Instructions or Warnings, 19 Sw. L.J. 43, 44 (1965). Note that this is the same symposium at which Wade, also concluding that strict liability applies only to manufacturing defects, presented his first articulation of the risk-utility test appropriate for design defects. See infra text accompanying notes 93-94.

48 Noel, Manufacturers' Liability for Negligence, 33 Tenn. L. Rev. 444 (1966).

49 Wade, Strict Tort Liability of Manufacturers, 19 Sw. L.J. 5 (1965).

50 Id. at 14.

51 Id.

product is "unreasonably" dangerous. Wade concedes that the term "defect" could be defined to embrace such cases.[52] But he claims that the effort to do so is likely to prove misleading.[53] The central issue according to Wade is one of the manufacturer's conduct: did the manufacturer act reasonably in putting the product on the market? "This, it would seem, is another way of posing the question of whether the product is reasonably safe or not. And it may well be the most useful way of presenting it."[54] Wade directly responds to the allegation that in cases of this nature strict liability has no meaning independent of negligence. "It may be argued that this is simply a test of negligence. Exactly."[55]

Roger Traynor also shared the view that strict liability in Section 402A was only applicable to manufacturing defects. Traynor's opinion on this issue has been misunderstood, in part because the first legitimate strict liability case, *Greenman v. Yuba Power Products, Inc.*[56] would be classified today as a design defect case and, in part because Traynor was one of the first to seriously consider the difficult questions involved in extending strict liability to design defects, as I shall discuss below. But there is no doubt that Traynor was thinking of manufacturing defect cases when he articulated the strict liability approach. In his famous 1965 article, *The Ways and Meanings of Defective Products and Strict Liability*,[57] Traynor defines a "defective product" as one which fails to match average product quality or one which deviates from the product norm.[58]

Traynor clearly has manufacturing defects in mind here. Traynor continues in the article to discuss problems with the "deviation from the norm" standard. What are these problems? According to Traynor, the deviation from the norm standard is *overly* inclusive; it goes too far.[59] Again, along with Keeton and Wade, Traynor is concerned that the defect rule might be applied to unavoidably unsafe products, such as blood or pharmaceuticals. Traynor does not suggest how he would approach such products: his article was meant to be provoking; he raises a series of difficult problems, but provides no answers to them. (Of course, Traynor was a sitting judge at the time.)

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52 Id. at 15 & n. 53.

53 Id.

54 Id. at 15.

55 Id.

56 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

57 Traynor, The Ways and Meanings of Defective Products and Strict Liability, 32 Tenn. L. Rev. 363 (1965).

58 Id. at 367.

59 Id. at 367-68.

But it is clear that he does not regard simple strict liability for defective products as an answer. Strict liability resolves only the less complex questions raised by manufacturing defects. And interestingly, Traynor describes *Greenman* as a manufacturing defect case.[60]

In retrospect, the founders' commitment to strict liability for only manufacturing and not for design defect cases should not be surprising. Recall the importance to the founders of the food cases as precedents for the application of strict liability. The food cases, of course, are quintessential examples of manufacturing defect cases. The issue in the food cases is whether some unexpected and harmful ingredient was mistakenly introduced into the food product or whether the processor's quality control efforts failed to detect spoilage. There is never an issue of defective recipe. Strict liability for food cases has nothing to do with design.

If the ambition of the founders were no more than strict liability for manufacturing defects, it becomes easier to understand the nature of the founders' objections to existing warranty and negligence law. It is also easier to comprehend why the founders thought it was perfectly appropriate to accomplish the change in the law by the Restatement process, rather than through more democratically legitimate legislation.

The founders objected to the warranty and tort law limitations on consumer recoveries because, in the context of manufacturing defect cases, each of the limitations seemed to operate as a legal technicality, without purpose and indifferent to the underlying merits of the claim. The arguments raised here are now familiar. Where a product because of mismanufacture has injured someone, why should it matter whether the injured person had personally paid the money for the product to become in privity of contract with the seller?[61] As long as statutes of limitations had not run, why should it matter whether the consumer had delivered some intermediate notice of breach?[62] Similarly, the potential injustice from the operation of the election of remedies section was obvious. The most telling example was one in which a seriously injured consumer had accepted a replacement product or a refund of the purchase price. Despite the consumer's independent personal injury, the election requirement might bar recovery.

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60 Id. at 367. Note that Traynor's description of *Greenman* has been ignored in the expansion of strict liability. *Greenman* itself refers to the application of strict liability for defects "in design and manufacture." 59 Cal. 2d at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701. Even Traynor did not address this discrepancy in description, again in my view, because none of the founders at the time had focused clearly on design problems as "defects."

61 James, pt. 2, supra note 40, at 193.

62 Id. at 206.

The other grounds for limitation on recovery were no better. Again, where a manufacturing defect had injured a consumer, why should the victim be forced to parse the manufacturer's advertising copy and, in addition, prove that he or she had specifically relied on the advertisement in purchasing the product?[63] Similarly, why distinguish between "imminently dangerous" products and others, where the product had deviated from the manufacturer's own standards.[64]

Where the source of the injury is a deviation from the manufacturer's own manufacturing and design standards, the various limitations on consumer recovery are very difficult to defend. They operate solely as legal technicalities defeating the just expectations of every party to the transaction. If the manufacturer must concede that the injury-causing product was defective because it deviated from internal standards, how can one justify invocation of the privity defense, the notice of breach defense, or the election of remedies defense? Why should only manufacturers of foodstuffs and hair-dyes bear special responsibilities?[65]

The various defenses can be easily justified in other contract and tort contexts. The privity of contract rule, for example, makes good sense in contexts involving explicit negotiation over contractual responsibilities at the various stages of transfer from manufacture to sale of the finished product.[66] But there is little explicit negotiation in the context of the typical consumer purchase.[67] Similarly, the requirement that the complaining party give notification of a claim of contract breach is a useful rule both where the contract provides for continuing performance over time and where it is possible for the performing party to mitigate loss from the breach by cure or otherwise. But, again, where a consumer has suffered personal injury from a manufacturing defect, the independent notice requirement has no function whatsoever. The advertising reliance requirement and the various limitations of negligence recovery make just as little sense for manufacturing defect cases. In the context of manufacturing defects

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63 Id. at 196.

64 Id. at 227.

65 See James, General Products—Should Manufacturers Be Liable Without Negligence? 24 Tenn. L. Rev. 923, 926 (1957).

66 Winterbottom v. Wright, 152 Eng. Rep. 402 (1842), is a perfect example: the legal obligations of the postmaster, the employee and the manufacturer had all been negotiated separately. For a further discussion see Epstein, Products Liability as an Insurance Market, 14 J. Legal Stud. 645 (1985).

67 This of course was the point made vividly in Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (in my view, too vividly, see Priest, A Theory of the Consumer Product Warranty, 90 Yale L.J. 1297 (1981)).

these various defenses are not justified by the most basic concepts of contract and tort law.

It should be emphasized that these objections to the various defenses to consumer recovery were unrelated to concerns about the empirical dimension of the problem. The election requirement of Section 69, for example, may have influenced pleadings, but there was never an empirical demonstration that the Section had been strictly interpreted to substantially defeat consumer recoveries. Similarly, the notice requirement seems egregious on paper in manufacturing defect cases. But it is difficult to find cases in which it was actually invoked to prevent consumer recovery. The reliance requirement regarding advertising and the various limitations on negligence recovery were, perhaps, more significant. But none of the founders ever believed that the problem of consumer product injuries was a significant one for society. Recall Prosser's estimate that only one in a hundred case outcomes would change.[68] In contrast to automobile or workplace injuries, consumer product-related injuries represented a minor field. Correcting and revising the law for the field constituted a technical improvement in the law, rather than an important advance in social justice.

The founders' intent, thus, was largely to clean up an area of law for which the more general rules of contract and tort did not quite fit. Changing the grounds for recovery for injuries caused by manufacturing defects was a reform that could command—as it did—widespread support. The reform generated little objection and no principled objection.[69] Indeed, because the Restatement project sought no more than to correct a set of technical flaws in the law, it could be implemented directly by lawyers. There was no need to consult with the interest groups affected,[70] whether manufacturers or consumers, or to seek legislative authorization for the change.

II. SECTION 402A AND ITS COMMENTS OBSERVED

This Part looks directly to the text of Section 402A and its Comments to infer what the founders intended for strict liability. In my view, the Section and its Comments make very clear that the strict

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68 Prosser may well have been exaggerating. For a description of Prosser's "empirical flexibility" in his advocacy of strict liability, see Priest, supra note 2, at 516-18.

69 Manufacturing interests never seriously objected to the change in the law. See id. at 517-18.

70 At the 1962 Meetings of the American Law Institute, the members entertained a statement by the pharmaceutical industry regarding strict liability for drugs, but without serious discussion. There were no industry presentations the next year when the Institute considered extending the strict liability standard to all products.

liability standard was to apply chiefly to manufacturing defects.[71] The text of the Comments strongly supports that interpretation. More significant, in the many illustrations of how strict liability is to be applied, there is not a single clear example of application of strict liability to design defects. There are many additional passages which, concededly, are susceptible to more expansive interpretations of strict liability. Indeed, I shall explain in the next Part how the open-ended character of these passages has led to the vast expansion of modern law.

Section 402A attaches strict liability to anyone who sells a product "in a defective condition unreasonably dangerous" to user or consumer. The operative definitions in the Comments of the "defective condition" and "unreasonably dangerous" requirements mirror the analysis of the scholarly writings of Prosser, Keeton and Wade, described above.

The concept "defective condition" is defined in Comment g affirmatively and in Comment h negatively: when a product is not in defective condition. Comment g provides that a "defective condition" is one "not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." This definition is not sufficiently specific to distinguish between manufacturing and design defects, a vagueness of substantial subsequent importance, as we shall see below.[72] Comment h provides that a "product is not in defective condition when it is safe for normal handling and consumption," again ambiguous as between manufacturing and design defects.

A fuller description in Comment h, however, provides more detail as to the meaning of defective condition. According to Comment h, the defective condition of a product "may arise not only from harmful ingredients, not characteristic of the product itself, either as to presence or quantity, but also from foreign objects contained in the product, from decay or deterioration before sale, or from the way the product is prepared or packed." The reference to the "quantity" of an ingredient may possibly be interpreted to incorporate a product whose design is defective because of excessive ingredient levels. Other than this vague reference, however, the description can only refer to manufacturing defects.

The unreasonably dangerous requirement is defined in Comment i. The Comment makes quite clear—as is well-known—that the unreasonably dangerous requirement was meant to serve as a limitation

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[71] The Comments also tangentially refer to a manufacturer's obligation to provide warnings. See infra text accompanying notes 85-86.

[72] See infra text accompanying notes 95-97.

on liability where a product might cause harm, but where the consumer was fully aware of the product's harm-causing potential, such as in the familiar cases of tobacco and alcohol. The conceptual basis for the Comment was the distinction between manufacturing defects and unavoidably dangerous products, discussed extensively by Keeton, Noel, and Wade, as described above.[73] The Comment, following Keeton and Wade, states directly that strict liability was not meant to apply to this category of defects.

Comments g, h, and i provide the only descriptions of the defect requirement. The remaining Comments consist of elaborations of the history of strict liability, its scope in terms of potential defendants and plaintiffs, defenses, extensions and limitations. Though no other of the Comments directly addresses the defect requirement, the Comments together provide the strongest evidence of the founders' exclusive focus on strict liability for manufacturing defects through the illustrations that the Comments provide of how strict liability is to be applied. The Comments present fifty-four separate examples (or sets of examples) of the application of the types of cases to which the strict liability standard was meant to apply. Six of the fifty-four examples are unclear as to the character of the defect, most commonly, because the example's point is to illustrate that the scope of strict liability extends both to users and bystanders and against all levels of sellers. Of the remaining forty-eight examples, eleven illustrate unavoidably unsafe products, exempted from strict liability. And of the thirty-seven examples that remain, five represent exceptions which prove that strict liability applies to manufacturing defects and the remaining thirty-two are each applications of strict liability in manufacturing defect contexts. The strongest evidence that the founders focused exclusively on strict liability for manufacturing defects is that they did not present a single example in the Comments of an alternative strict liability application.[74]

I present below the examples of the application of strict liability presented in the Comments to Section 402A. In some instances I have grouped together string examples or sets of similar illustrations. Those examples unclear as to the character of the defect are marked separately.

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[73] See supra text accompanying notes 36-40 (Keeton), 43-47 (Noel), 52-56 (Wade).

[74] I discuss the founders' approach toward warnings infra text accompanying notes 85-86.

Comment	Product
Comment b: History:	food (several examples), intimate bodily use, cinder blocks[75]
Comment d: Scope:	food, intimate bodily use, various products to show scope (unclear)
Comment e: Not raw materials:	poisonous mushrooms
Comment f: Seller:	food (several examples), exempts some food, (housewife selling jam or neighbor selling used car)
Comment g: Defective condition:	food suggestion ("necessary sterilization")
Comment h: Exception to defect:	bottled beverage broken against radiator, excessive salt in food, excessive candy, excessive drug dosage
but strict liability applies to:	harmful ingredient, foreign objects, decay, deterioration, carbonated beverage with weak (cracked or jagged)[76] bottle or excessive pressure, poisonous drink
Comment i: Unreasonably dangerous:	
exceptions to strict liability:	sugar to diabetics, castor oil in Mussolini torture
exception to	good whisky
applies to	bad whiskey with fusel oil
exception to	good tobacco
applies to	tobacco with marijuana
exception to	good butter
applies to	bad butter contaminated with fish oil

[75] See Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958) (bad cinderblock lot).

[76] Note that the source of the weakness in the bottle is *not* improper bottle design.

Comment j: Directions:	
exception to common allergies:	eggs, strawberries, excessive alcohol, saturated fats, effect on heart
Comment k: Unavoidably unsafe:	
exception to	drugs, Pasteur vaccine, vaccines generally, experimental drugs
applies to	impure ingredients in drugs
Comment l: User and consumer:	food example ("guest at table"), spoiled rabbit, beer bottle, permanent wave solution, various products to show scope (unclear), pebble in can of beans[77]
Comment m: Warranty (rejecting theory):	food ("consumption")
Comment o: Non-users:	exploding bottle, automobile (unclear)
Comment p: Further processing:	coffee beans contaminated with arsenic, auto steering gear (unclear)
exception to	raw material (pigiron) used in tricycle (unclear)
Comment q: Components:	auto tire (unclear), brake cylinder (unclear), airplane instrument[78]

The unanimity of approach of these multiple examples demonstrates again the narrow focus of the founders. It is clear that the founders chiefly intended strict liability to apply to manufacturing defect cases. This implication is bolstered by an earlier finding that of the forty cases that Prosser cited in the Appendix to Section 402A to support his claim that the various state courts were increasingly adopting strict liability, all but two were clearly manufacturing defect

[77] Contrast with Fleming James, who in urging the expansion of strict liability to incorporate design defects (among others) argued, "Surely greater danger lurks in a defective automobile wheel than in a pebble in a can of beans," James, General Products—Should Manufacturers Be Liable Without Negligence?, 24 Tenn. L. Rev. 923, 926 (1957).

[78] See Goldberg v. Kollsman Instrument Co., 12 N.Y.2d 342, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963) (manufacturing defect).

cases.[79] The novelty of the cases to Prosser was, most frequently, their relaxation of the privity of contract rule. Moreover, of the eight cases in which courts had adopted standards most closely resembling strict liability (thus, the cases on which Prosser most heavily relied),[80] *all* were manufacturing defect cases.

The Comments to Section 402A assume a new meaning when read from the manufacturing defect prospect. Comment n, addressing contributory negligence, for example, has always been difficult to understand and justify. Comment n provides that, since the liability of Section 402A is not based upon a seller's negligence, the consumer's contributory negligence will not generally be relevant.

> Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand, the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

The denial of traditional contributory negligence in Comment n has had two principal effects. First, it has inspired subsequent judicial efforts to define a legal regime for strict liability that is distinctively different than the negligence regime.[81] Second, it has supported specific judicial rulings denying the relevance of consumer contributory actions in a wide range of products liability contexts.[82]

The denial of contributory negligence is peculiar, however, because the strongest modern defense of strict liability has insisted on the vitality of the contributory negligence defense. In recent years, a

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[79] Priest, supra note 2, at 514-16. I now include *Greenman v. Yuba Power Prods., Inc.*, given my new reading of Justice Traynor's interpretation of the case. See supra note 60 and accompanying text. The only clear exceptions are Beck v. Spindler, 256 Minn. 543, 99 N.W.2d 670 (1959) (defectively designed mobile trailer roof), and King v. Douglas Aircraft Co., 159 So. 2d 108 (Fla. Dist. Ct. App. 1963) (defectively designed combustion chamber). Two other cases raised failure to warn issues. McQuaide v. Bridgeport Brass Co., 190 F. Supp. 252 (D. Conn. 1960); Midwest Game Co. v. M.F.A. Milling Co., 320 S.W.2d 547 (Mo. 1959).

[80] See Priest, supra note 2, at 514-17.

[81] I discuss and criticize this different regime in Priest, Products Liability Law and the Accident Rate, in Liability Perspectives and Policy 184 (R. Litan & C. Winston eds. 1988) [hereinafter Priest, Products Liability], and in Priest, Modern Tort Law and Its Reform, 22 Val. U.L. Rev. 1 (1987).

[82] See, e.g., Luque v. McLean, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972), and McCown v. Int'l Harvester Co., 463 Pa. 13, 342 A.2d 381 (1975) (both holding that contributory negligence is not an available defense in strict liability actions).

group of lawyer-economists, led by Professors Shavell and Landes and Judge Posner, have trumpeted the economic efficiency of modern strict liability.[83] The efficiency claim, however, requires not only that contributory negligence be an available defense, but more centrally that the consumer's contributory negligence be the effective basis for determining liability.[84]

Comment n's approach to contributory negligence, however, becomes plausible once it is recalled that the founders had meant strict liability to apply chiefly to manufacturing defect cases. In the context of a manufacturing defect, a consumer's ability to contribute to the occurrence of an injury is very constrained. If the consumer is unaware of the defect inherent in the product, there is no range for contributory negligence. As directed by the Comment, only where the consumer has become aware of the defect, yet voluntarily proceeds to use the product, does the concept of contributory negligence have a place. As long as strict liability is applied only in manufacturing defect contexts,[85] the denial of contributory negligence makes perfect sense, including perfect economic sense.[86]

Section 402A's Comment j dealing with warnings and instructions has also seemed peculiar. Comment j provides that, in some cases, sellers can be required to give warnings or instructions as to product use. Comment j has been the source of the extraordinary explosion of defective warning law in the years following Section 402A's adoption.[87] Yet, the illustrations to Comment j all are examples of Keeton's and Wade's second category of defects, unavoidably dangerous products, such as products to which some set of consumers is allergic or drugs for which some set of consumers is particularly susceptible.

Viewed from the perspective of the Keeton and Wade writings on this subject, Comment j represented a small step toward addressing consumer losses which otherwise were denied under the founders' strict liability approach. According to Comment j, though generally free from liability without negligence, a manufacturer knowing that

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83 Shavell, Strict Liability Versus Negligence, 9 J. Legal Stud. 1 (1980). Landes & Posner, A Positive Economic Analysis of Products Liability, 14 J. Legal Stud. 535 (1985).

84 See discussion of this point in Priest, Products Liability, supra note 81.

85 Of course, there can be contexts in which a consumer's clearly contributory negligence combines with a manufacturing defect to cause injury, for example, a defective steering column in the hands of a reckless driver. This complication was far beyond the conception of the founders who, as the Comments' illustrations suggest, were concerned chiefly with simpler defects. See supra text accompanying notes 75-78. I am grateful to Gary Schwartz for this point.

86 But see supra note 85.

87 For a brief review of this caselaw, see Priest, supra note 2, at 523-525.

there exists some set of particularly susceptible consumers is required to provide a warning reporting the product's ingredients.

As the writings of Keeton and Wade make clear, however, the warning requirement placed on manufacturers was meant to be modest. And Comment j closes with a paragraph that, in retrospect, emphasizes how modest that burden was to have been, but that in the subsequent elaboration of strict liability has been the source of a vast expansion in warning liability. Comment j reads: "Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous."

In years subsequent to the adoption of Section 402A, this paragraph has been interpreted by courts to eliminate the necessity on the part of consumers to prove causation: that the absence of a product warning in fact caused the injury suffered by the consumer.[88] Its original meaning, however, is entirely different. The writings of Keeton and Wade and Noel, from which the warning requirement derived, show that, far from a source of expanded liability, the paragraph was intended to constrain the manufacturer's warning duties. The paragraph was meant to qualify the warning obligation to the bare provision of the warning in some form. The intent of the paragraph was to suggest that the manufacturer was not to be made liable if the consumer had failed to read the warning. Nor was it necessary for the manufacturer to devise ways to ensure that the reader would see and appreciate the warning's contents. As long as a warning existed in some form, the manufacturer's duties were discharged.

III. STRICT LIABILITY LED ASTRAY

As is well-known, neither strict products liability nor the extension of the strict liability approach in other legal areas has followed the course the founders intended. Strict products liability has not been limited to manufacturing defect cases. And the broader influence of the strict liability idea extends far beyond the limited contexts of defensible automatic recovery that the founders thought they had defined.

As the founders expected, the application of strict liability to manufacturing defect cases did not signal a revolution. Prosser had suggested that only one case out of a hundred would be decided differently; of manufacturing defect cases, he may have been accurate. It

[88] See, e.g., Phillips v. Kimwood Mach. Co., 269 Or. 485, 525 P.2d 1033 (1974).

was very quickly perceived, however, that the product defect problem was more complicated than originally thought. Roger Traynor's 1965 article, discussed above, was suggestive of some of the problems.[89] Although the principal point of the article was the reaffirmation of strict liability for manufacturing defects, Traynor probes toward the problem of dangerous design. He is clearly not prepared to advocate strict liability in the design context, but he is uneasy with the lack of an obvious analytical approach.

At roughly the same time, Ralph Nader began his attack on design problems in American automobiles. In a 1965 article, Nader argued that legal liability should serve as a deterrent against harm-causing manufacturer design.[90] It is an important index of the times, however, that the liability Nader was recommending for these cases was negligence liability. Two years later, however, Nader focused his views. In a 1967 article with Joseph Page, Nader strongly criticized the "deviation-from-the-norm" defect standard that Justice Traynor had recommended in 1965, urging the application of strict liability to design-related injuries.[91]

At about the same time, John Wade began to appreciate the product design issue.[92] Wade initially insisted on retaining the strict liability standard for manufacturing defects alone.[93] With respect to other forms of defects, like design defects, Wade began to devise a way to apply the negligence standard. Wade built from sections 291-293 of the 1934 *Restatement of Torts*. These sections had been the source of Learned Hand's famous *Carroll Towing* decision in which Hand proposed a form of cost-benefit analysis for the determination of negligence.[94]

Wade attempted to adapt the cost-benefit approach for the determination of negligent product design. He proposed seven factors relevant to the evaluation of a manufacturer's design negligence. Regrettably, Wade did not follow the Restatement approach with much care. The *Restatement* sections had clearly indicated that the cost-benefit calculus was to be conducted against alternative available actions that the defendant might have taken. If Wade had appreciated this point, the elements of his cost-benefit test—which he deemed

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89 Traynor, supra note 57.

90 Nader, Automobile Design: Evidence Catching Up with the Law, 42 Den. L. Center J. Incorporating Dicta 32 (1965).

91 Nader & Page, Automobile Design and the Judicial Process, 55 Calif. L. Rev. 645 (1967).

92 Wade, Strict Tort Liability of Manufacturers, 19 Sw. L.J. 5 (1965).

93 Id.

94 United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

"balancing the utility of the risk against the magnitude of the risk"[95]—would have focused closely on alternative designs available to the manufacturer. Instead, Wade more broadly incorporated elements that included the utility of the product as a whole to be weighed against product risk. Some years later, he modified his risk-utility test to also incorporate insurance considerations in what has now become the dominant standard for evaluation of design defects.[96]

The efforts to define a sensible strict liability standard for the design-related injury problem proved exceptionally difficult. Many courts, especially in the early years following adoption of the *Restatement*, drew upon the references in Comments g and i to consumer expectations of product dangers. The consumer expectation language had been inserted in the Comments to reinforce the contributory negligence/assumption of risk proposition of Comment n: that the only manufacturer defense to strict liability (again, given the expected manufacturing defect context) was the consumer's voluntary decision to use the product though aware of the defect. Extended as a standard of design defects, the consumer expectation language vastly increased manufacturer liability, since it was a standard virtually without content.[97] Wade's risk-utility test also proved to lack specific content. The various factors are redundant and suggest that any fact related to the product is relevant for resolution of the design question.

Except for manufacturing defect cases, then, the legacy of the *Restatement* and its Comments was uncertainty. The Comments were read generally to deny the relevance of manufacturer defenses. They were read to expand, rather than to constrain, manufacturer liability for defective warnings. They provided no definitive guidance as to sensible standards for design defects.

In my view, it was at this point, rather than earlier, that the broader intellectual currents of risk distribution and cost internalization that had been advocated in the academic literature for the preceding three decades began to influence the direction of the law.[98] As I have shown elsewhere, the evolution of standards in both design and

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95 Wade, supra note 90, at 17.

96 Wade, On The Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825, 837-38 (1973). Wade's new set of factors continued to number seven, because he combined two of the previous factors dealing with consumer awareness of injuries.

97 The employment of the standard is described in Priest, The Disappearance of the Consumer from Modern Products Liability Law, in The Frontier of Research in the Consumer Interest 771 (E. Maynes ed. 1988), and Priest, Products Liability Law and the Accident Rate, in Liability Perspectives and Policy 184 (R. Litan & C. Winston eds. 1988).

98 See generally Priest, supra note 2 (discussing the evolution of enterprise liability and stressing that the progression toward absolute liability was both foreseen and influenced by three decades of contracts and torts literature).

warning cases have been strongly directed by the concepts of risk distribution and cost internalization.[99] The direction of this influence has been toward absolute liability. The founders stated with great emphasis that the strict liability standard that they were proposing stopped far short of absolute liability. Understood in context, I believe that the founders meant what they said. The founders failed to understand, however, that the Restatement section and the Comments that they drafted were not sufficiently specific to constrain the influence of the ideas of risk distribution and cost internalization that had dominated the legal landscape. The founders had attempted to constrain strict liability even within the manufacturing defect context. They clearly failed.

[99] Id. at 519-27.